

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:TL-N-71-01
MBalachandran

date:

to: Charles J. Utter, Territory Manager, Territory 1460, Manhattan
Attn: Revenue Agent Judy Chen

from: Area Counsel (LMSB:FSH)

subject: Supplement to February 23, 2001 Memorandum
[REDACTED]
Form 872-P (Tax Years ending [REDACTED] and [REDACTED])
Consent to Extend the Statute of Limitations on Assessment

STATUTE OF LIMITATIONS EXPIRES March 31, [REDACTED]

UIL No. 6229.02-00

EIN No. [REDACTED]

Background

Please refer to our February 23, 2001 memorandum for the facts and discussion in this case. The remainder of this memorandum supplements that February 23 memorandum.

Supplemental Fact

In addition to the audit letter for the [REDACTED] year mentioned in our February 23 memorandum, on [REDACTED] a Notice of Beginning of Administrative Proceeding was sent to the taxpayer which states that it is for the tax year ended [REDACTED].

Supplemental Discussion

While this case deals with two different dates, the Tax Court has ruled in the IRS's favor when the mistake dealt with two different names. The incorrect partnership name, written at the top of the Form 872-P, is also arguably a scrivener's error. See, e.g., San Francisco Wesco Polymers Inc. v. Commissioner, T.C. Memo. 1999-146 (holding that a Form 872, executed in the name of a dissolved corporation's successor, was result of mutual mistake and that the name of the former corporation was intended).

We caution that if challenged by the taxpayer, more factual development will be required for the Service to fully support the position that the first 872-P signed on behalf of the Commissioner on [REDACTED] was intended to cover both the December 30, [REDACTED] and December 31, [REDACTED] years. This is especially so since a new partnership was created on December 30, [REDACTED] which would usually require the execution of a separate 872-P.

DISCLOSURE STATEMENT

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ROLAND BARRAL
Area Counsel (LMSB:FSH)

By: _____
PETER J. LABELLE
Associate Area Counsel

Office of Chief Counsel
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INTRODUCTION

You have asked us to determine whether a Form 872-P signed by the taxpayer on [REDACTED] validly extended the statute of limitations for two tax years ending December 30, [REDACTED] and December 31, [REDACTED].

ISSUES

1. Did the Form 872-P executed on [REDACTED] validly extend the statute of limitations for both tax years ending [REDACTED] and [REDACTED]?
2. Was there a mutual mistake at the time that the Form 872-P was executed?

CONCLUSION

Based on the facts and the case law outlined below, we believe that if challenged we should be able to argue effectively that the Form 872-P extended both the [REDACTED] and the [REDACTED] years.

FACTS

Tax Returns

The partnership named [REDACTED] ("[REDACTED]" or "taxpayer") filed two tax returns for [REDACTED]. The first return is for the period January 1, [REDACTED] to December 30, [REDACTED], and was filed on [REDACTED] (the "first return"). On December 30, [REDACTED], the partnership was terminated pursuant to Code section 708(b)(1)(B), when [REDACTED]% of the ownership interests were transferred. The new partnership filed a one day return for December 31, [REDACTED] on August 11, [REDACTED] (the "second return"). The employer identification number shown on both returns is [REDACTED].

First Return

The first return, which is marked as the "final return," designates [REDACTED] c/o [REDACTED], identifying number [REDACTED], as the tax matters partner. The attached Schedule K-1s show the partners are [REDACTED], general partner with [REDACTED]% interest, [REDACTED] c/o [REDACTED], general partner with [REDACTED]% interest, and [REDACTED] c/o [REDACTED], general partner with [REDACTED]% interest. All three Schedule K-1s have checks in the box marked Final K-1. Attached to the first return are two forms requesting extensions of time to file for calendar year [REDACTED]: Form 8736 requesting a three month extension and Form 8800 requesting an additional extension until October 15, [REDACTED]. The return shows a date of signature of the general partner of [REDACTED].

The first return attached a statement that "a termination of

██████████ ("██████████") occurred on ██████████. The ownership interests in ██████████ of ██████████ (██████████%) and ██████████ (██████████%) were contributed to ██████████ ("██████████"). These contributions were in exchange for ownership interests of ██████████. Since the aggregate ownership interest in ██████████ of these partners was ██████████%, this is a termination that results in two ██████████ forms - ██████████ - ██████████ and ██████████. ██████████ will continue to use the same taxpayer identification number ██████████."

Second Return

The second return designates ██████████, with no identifying number, as the tax matters partner. The attached Schedule K-1s show the partners are ██████████, general partner with ██████████% interest, and ██████████ c/o ██████████, general partner with ██████████% interest. Forms 8736 and 8800 are also attached to the second return, requesting the same extensions to file as the forms attached to the first return.

Audit Letter

The audit letter dated ██████████ stated it was for the period ██████████ to ██████████.

Information Document Requests

On ██████████, the examining agent made two information document requests ("IDR") to ██████████. One was for the tax year ended ██████████ and asked, among other things, for a written explanation of why the corporation filed a final tax return for the last day of the tax year ending ██████████, the liquidation plans, and the basis worksheet for each partner and the partnership. The other IDR was for the tax year ended ██████████ and asked, among other things, for the partnership agreements, mortgage/closing statements for the purchase or sale of the ██████████, a reconciliation of the balance sheets for the ██████████ return and the ██████████ return, and an analysis of account with the loans from related parties.

A third IDR was sent on ██████████, asking for, among other things, the following items pertaining to the ██████████ return: an explanation of how the general partners (██████████, ██████████, and ██████████) qualify as owner-operators; an analysis of the account of loans receivable with information on which related parties and partners involved; an

explanation for the difference in accrued expenses and taxes on the [REDACTED] return and the [REDACTED] return; information regarding the 'other' journal entry on the K-1's for the tax return for the year end [REDACTED]; balances and all adjusting entries for [REDACTED] for tax return [REDACTED] and tax return [REDACTED]; sales agreement to substantiate the statement on the [REDACTED] return that the property is [REDACTED]% disposed; a reconciliation of the tax return for year end [REDACTED] to the one day tax return [REDACTED]; copies of the [REDACTED] partnership agreement and the [REDACTED] partnership agreement; and a clarification of the balance sheets and how profits and losses were allocated between the two tax returns.

Meeting Request

By letter dated [REDACTED], the agent requested a meeting with [REDACTED] regarding the tax year [REDACTED] to [REDACTED].

872-Ps

Under IRC § 6229(a), the statute of limitations for making assessments on the partnership items of [REDACTED] on both tax returns would have expired on August 11, [REDACTED].

The first fully executed form 872-P, ("the 872-P") for [REDACTED], formerly [REDACTED], was signed by the TMP¹ on [REDACTED] and on behalf of the Commissioner on [REDACTED]. The 872-P states that "the amounts of any Federal Income tax with respect to all partners attributable to any partnership item(s) for the above named partnership for the period(s) ended [REDACTED] may be assessed at any time on or before [REDACTED]." The two dates were filled in by hand, and the surrounding text is part of the standard form. No mention is made of [REDACTED], the date when the first return was filed.

A second 872-P was executed allegedly by the tax matters partner on behalf of [REDACTED] on [REDACTED]. As with the first extension, it states that it is for the period(s) ended [REDACTED]. The extension sought is until September 30, [REDACTED]. You have informed us that you will have the 872-P signed on behalf of the Commissioner.

A third 872-P was executed allegedly by the tax matters

¹Although there is a signature on the line next to "tax matters partner sign here," the signature is illegible.

partner on behalf of 15 Penn Plaza Associates on [REDACTED]. This extension states that it is for the period(s) ended [REDACTED]. The extension sought is until September 30, [REDACTED]. This 872-P was signed on behalf of the Commissioner on [REDACTED].

DISCUSSION

Introduction

We have been asked to determine whether the 872-P validly extended the statutory period to assess for both the [REDACTED] and [REDACTED] years. We have not considered and do not discuss other potential issues in the Form 872-Ps such as the authority of the individual signing to commit the partnership. However, we strongly recommend that you verify that the person signing the second and third 872-Ps had authority to do so.

When a partnership terminates it is required to file a final return. Treas. Reg. 1.708-1(c)(ii). [REDACTED] apparently terminated on [REDACTED] when [REDACTED] transferred their [REDACTED] % ownership interest to [REDACTED]. IRC §§708, 761(e); Treas. Reg. 1.708-1(c)(2); taxpayer statement attached to [REDACTED] return. Accordingly, the partnership filed a final return for the period [REDACTED] to [REDACTED]. The new partnership, which continued under the same name and the same EIN, filed a return for the one day left in the year, [REDACTED].

Did the Form 872-P Validly Extend the Statute of Limitations for Both Tax Years Ending [REDACTED] and [REDACTED]?

Based on the information provided to us, the 872-P is a valid extension for the [REDACTED] year. Absent extension, the statutory period for the partnerships would have expired on August 11, [REDACTED]. IRC § 6229(a). The limitation on the time for making assessments of partnership items may be extended by written agreement entered into before the expiration of such period. IRC §6229(b). At the request of the examining agent, the 872-P was executed for [REDACTED] to satisfy the requirement of the statute. The examining agent has informed us that she intended for the 872-P to extend the statute of limitations for both the [REDACTED] and [REDACTED] years, but the form states that it extends the assessment period for the tax year ending [REDACTED] only.

The 872-P would be a valid extension of the [REDACTED] year also if the [REDACTED] date was omitted because of a "mutual mistake" of both parties. Mutual mistake must be shown by "clear

and convincing" evidence. If a mutual mistake was made, a Court considering the Form could apply the principle of "equitable reformation"² to reform the language in the 872-P so that it reflects the true intent of the parties to extend both the [REDACTED] and [REDACTED] years.

Was There a Mutual Mistake at the Time That the Form 872-P Was Executed?

A Form 872 is not a contract, but a unilateral waiver of defense by the taxpayer. Buchine v. Commissioner, 20 F.3d 173 (5th Cir. 1994). Nevertheless, the Court has frequently applied principles of contract law in interpreting the terms of a waiver because an agreement denotes a manifestation of mutual assent. Durgin v. Commissioner, T.C. Memo 1992-656 (1992). Contract principles are significant because it is necessary that the parties reach a written agreement as to the extension. Woods, 92 T.C. at 780 (citing Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983)).

"Even though a written extension is not ambiguous when it is clear on its face and its meaning is certain, it may be characterized as a mutual mistake if it misstates the intent of the parties." Kelley v. Commissioner, 59 TCM (CCH) 206, 210, aff'd, 45 F.3d 348 (9th Cir. 1995) (citing Woods 92 T.C. at 780-81). The mere fact that the mistakes in the written extensions originated with respondent does not preclude reformation. Id. The evidence of the mistake must be clear and convincing. Woods at 789, f. 14. "It is the objective manifestation of mutual assent as evidenced by the parties' overt acts that determines whether the parties have made an agreement." Woods at 780 (citing Kronish v. Commissioner, 90 T.C. 684, 693 (1988)).

Based on the above principles of contract law as applied to Form 872s, courts have decided many cases reforming the 872 when mutual mistake is found. Of relevance, courts have applied equitable reformation when mutual mistake has resulted in an

² The court applies the equitable principle of reformation when the mutual assent of the parties is not correctly reflected on the written waiver. Woods v. Commissioner, 92 T.C. 776 (1989) At least two United States Courts of Appeals have upheld the Tax Court's equitable power to reform extension agreements. Kelley v. Commissioner, 45 F.3d 348 (9th Cir. 1995); Buchine v. Commissioner, 20 F.3d 173 (5th Cir. 1994).

erroneous date on Form 872s:

1) In Atkinson v. Commissioner, 58 T.C.M. (CCH) 1257 (1990), the IRS intended to extend the statute for 1981, but mistakenly put 1984 on the Form 872. The Court held that it could look at extrinsic evidence to ascertain if there was a mutual mistake, and found the following to be clear and convincing evidence that the taxpayer knew the year intended on the Form 872 was 1981: the taxpayers gave a Power of Attorney authorizing counsel to represent them regarding their 1981 taxable year, the taxpayers submitted a cash bond for the 1981 taxable year, the Form 872 specified an item which was an issue for the 1981 taxable year, the statute for the taxable year 1984 had not started running yet, and the taxpayers were reasonably on notice that the Form 872 they were signing in 1984 was for 1981 because they knew the Form 872 they signed in 1983 was for 1980. Of particular relevance to our case, the Court favorably considered the taxpayer's actions subsequent to signing the Form 872 (i.e., the grant of a power of attorney for the 1981 year and the posting of the bond) as proof of intent.

2) In Buchine v. Commissioner, 63 T.C.M. (CCH) 1838 (1992), aff'd, 20 F.3d 173 (5th Cir. 1994), the Tax Court decided that there was clear and convincing evidence to show that the Form 872-A, applicable on its face to 1984, did not reflect the intent of the parties and that there was a scrivener's mistake on the form. The taxpayers, Mark Buchine and his wife Karen Buchine signed a Form 872-A which showed 1984 as the tax year it was extending, but the IRS claimed it intended to extend the statute for 1981. Although the Buchines claimed they thought they were extending the 1984 year, the court looked to other extrinsic evidence to determine that the true intent of both parties was to extend the 1981 tax year. The Court concluded that based on Mark Buchine's working knowledge of tax law, he knew that the Form 872-A would not have been for tax year 1984 because the Form was executed in 1984 and because he knew that the IRS's policy was not to extend statutes unless the IRS determined that they wouldn't be able to determine the correct tax within the statutory period. Additionally, when Mark Buchine telephoned the IRS agent regarding the Form 872, he referenced the 1981 tax year. Furthermore, the transmittal letter sent with the Form 872 referred to the 1981 tax year.

In our case, the objective proof of the intent of both parties to extend both returns is partly found within the paperwork exchanged by the taxpayer and the IRS agent:

i) Subsequent to the Form 872, the taxpayer willingly signed two

new 872-Ps, one for the [REDACTED] year and the other for the [REDACTED] year, extending the statute until [REDACTED]. This indicates the taxpayer's intent to extend both years all along, including at the time the original Form 872-P was signed. We note that this appears to be the only documentary evidence in the file confirming the taxpayer's intent.

ii) The audit letter specifically referred to the [REDACTED] year. The agent sent two almost identical IDRs on [REDACTED], one of which referenced the [REDACTED] year and the other the [REDACTED] year. A third IDR was sent asking for information on both years. The agent also requested a meeting to discuss the [REDACTED] tax year. Thus, the taxpayer was on notice that both years were being audited.

iii) The agent has informed us that by oral communication the taxpayer knew that both years were under consideration by her.

iv) The tax due on one of the returns could not be determined if the tax due on the other was not determined, since the [REDACTED] return and the [REDACTED] return arise from the same assets and liabilities. The only difference is that the partners [REDACTED] and [REDACTED] now hold their legal interest in the partnership under the entity name [REDACTED]. The economic interests in the partnership are still the same.

Accordingly, if challenged, we should be able to argue effectively that the Form 872-P extended both the [REDACTED] and the [REDACTED] years.

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By: _____
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